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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 379

BAUSCH & LOMB OPTICAL CO., *Petitioner,*

v.

DEAN A. LYON, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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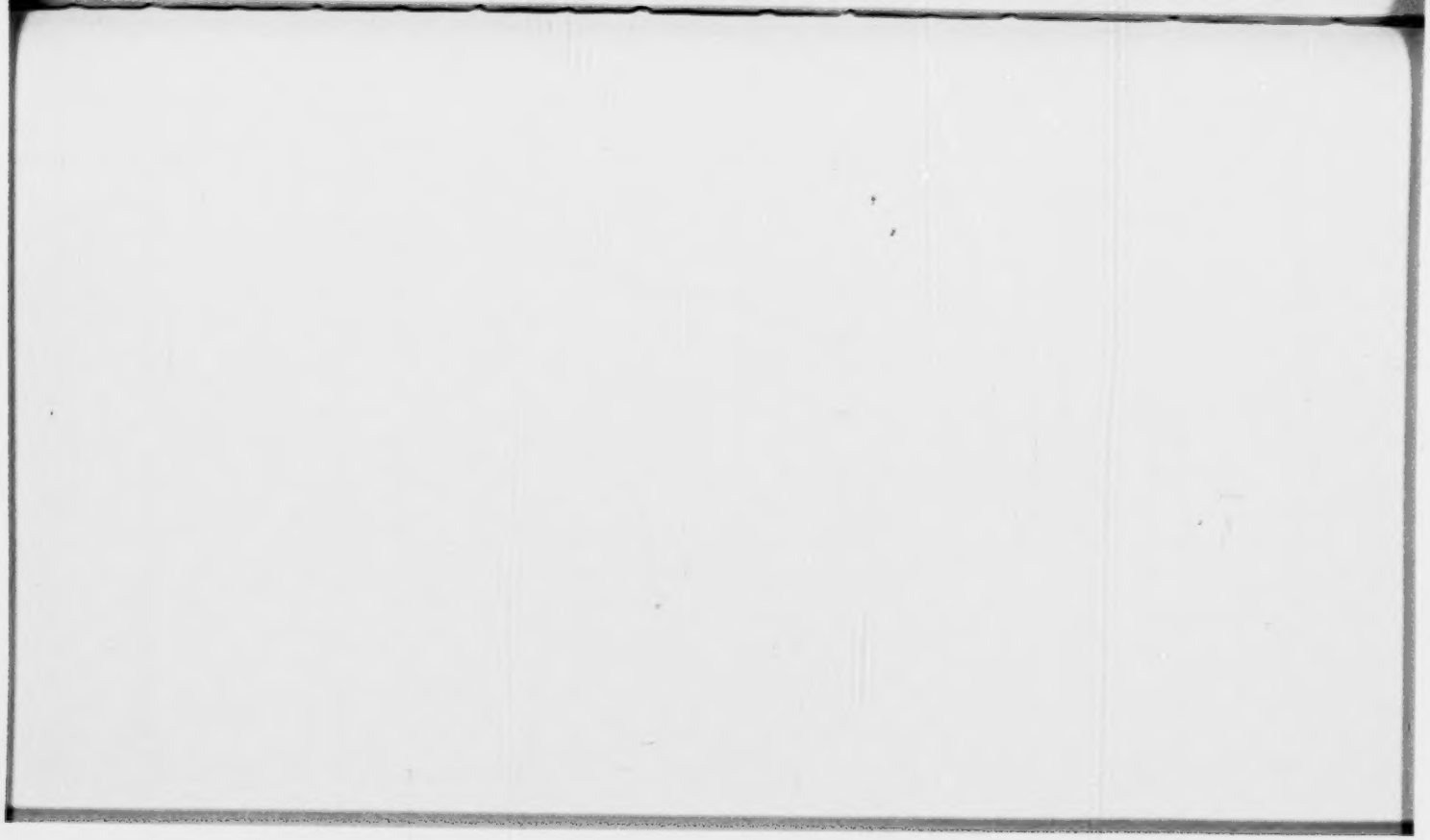

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This litigation is between an individual inventor, the plaintiff-respondent Lyon, and the defendant-petitioner Bausch & Lomb Optical Co., one of the largest optical corporations of the world.

This is not a "gadget" patent case as in *A. & P.* v. *Supermarket.** The invention is one of real dignity

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* *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147 (1950).

and importance; an improvement which m
the successful application of a complex scientific and chemical vacuum-evaporation process for depositing extremely thin light-transmitting films on optical elements for use in military instruments, binoculars, cameras, etc. It was of great and direct benefit to the public, contributing substantially to the success of our Armed Forces in the last war. In the words of the trial Court, it was an "outstanding" discovery which "greatly benefited the United States Navy" and "the industry in general" and was "overlooked by the most skilled scientists working in the art for long periods of time on the problem of obtaining hard and durable films though the solution was under their very eyes" (Find. of Fact 10, Vol. II, DA* 933a, Con. of Law 9, Vol. II, DA 947a).

This suit does not involve an attempt by a strong company to enforce a sweeping monopoly in patent rights. It is a defensive suit by an individual inventor, against this corporation which has asserted the right to deliberately appropriate his property while being unwilling to pay a small royalty which the trial Court found was reasonable (Find. of Fact 16, 17, Vol. II, DA 935a, 936a).

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* References to the record herein use "DA" with reference to Volumes I and II of defendant-appellant's appendix in the Court of Appeals, and "PA" with reference to the single Volume of plaintiff-appellee's appendix in the Court of Appeals.

The decision and findings of the trial Court are for convenience reprinted and bound in as the appendix to this brief, with the appropriate page numbers 910a-947a inclusive as used in Volume II of Defendant-Appellant's appendix in the Court of Appeals, being indicated. In referring to the decision (opinion) and findings of the trial Court throughout this brief, the page numbers of Volume II of Defendant-Appellant's appendix below (pages 910a-947a) will be used, but quick reference can be made to the designated page in the appendix bound in this brief.

patent does not restrict use of the invention by or for the government. The government retained a royalty-free license for all work performed for it, permitting its employee, the plaintiff, to retain title to the patent as applied to commercial or non-government use of the invention. It is only defendant's commercial operations, for profit, which are involved.

For a period of almost ten years, i.e., for substantially two-thirds the life of plaintiff's patent, the greatest of the optical corporations have caused to be withheld from plaintiff the modest commercial reward granted to him by his government for his great discovery. Plaintiff made his discovery in 1941, and devoted all his efforts to developing the invention for the Navy during the war and prior to the time of the issuance of his patent in 1946.

The Eastman Kodak Co. immediately upon issuance of plaintiff's patent unjustly involved it in interference with an application which it filed in the name of one Beggs, who had left the employ of the Eastman company several years before this application was filed in his name. The trial Court termed this Beggs application a "device to exact a license from the plaintiff" (Find. of Fact 23, 25, Vol. II, DA 938a).

In the meantime, defendant had applied plaintiff's method to its commercial work and refused to take a license. This suit was filed in 1949. Expensive pre-trial and trial proceedings lasted until early in 1954, when judgment was entered for plaintiff. Defendant Bausch & Lomb was held to be a deliberate infringer, and the patent was held valid. The appeal proceedings from that judgment extended until the middle of 1955,

when the Court of Appeals affirmed the judgment in favor of plaintiff.

Now, ten years after the issuance of plaintiff's patent, and almost fifteen years after he made his invention, defendant seeks, under the guise of "Questions" purporting to present the interests of the public, to further delay plaintiff's enjoyment of his patent by requesting a new review of the facts in the Supreme Court, rather than to pay plaintiff a modest royalty.

JURISDICTION

While the jurisdiction of the Supreme Court to review by granting certiorari is comprehensive, the decisions and findings below do not support nor present the questions posed in the petition.

The "Questions" of the petition are broad and indefinite, and they only challenge certain general obiter dicta expressions taken from context out of the opinion of the Court of Appeals. The opinion of the Court of Appeals must be read in the light of the decision and findings of the trial Court, to which it specifically refers, assumes familiarity with, and adopts.*

Petitioner presents its questions as though a patent *held invalid* for lack of invention before the 1952 Patent Act has been *held valid after* that Act, and assumes findings of lack of invention, anticipation and obviousness which never were made. On the contrary, the claims of the patent now in issue were held valid by both courts on strong findings of invention, novelty, and lack of obviousness. The patent *never was* held invalid for lack of invention.

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* The decision and findings of the trial Court are for convenience reprinted and bound in as the appendix to this brief.

In short, this case and this patent do not properly present to this Court the questions posed in the petition, and if such questions require determination, they must await a case which properly supports and presents them.

RESPONDENT'S STATEMENT OF THE CASE

Respondent does not accept petitioner's "Statement of the Case." It does not present the material facts as required by Rule 23-1 (e). It is so commingled with inaccuracy and misstatements of the findings of the Courts below as to be a sufficient reason for denying the petition under Rule 23-4.

The trial Court found that defendant Bausch & Lomb deliberately appropriated plaintiff's invention for its own commercial profit, and even *publicly claimed credit for having originated the invention,* while knowing that it had been discovered by the plaintiff (Find. of Fact 15, 16, Vol. II, DA 935a, 936a). The trial Court's findings were unanimously affirmed by the Court of Appeals (Appendix to Petition, page 17a).*

Contrary to the arguments in petitioner's "Statement of the Case" the facts found by the trial Court are that plaintiff's invention solved a serious problem which had existed for a long period of years in the industry (Find. of Fact 3, Vol. II, DA 929a). The great corporations and laboratories, such as Eastman Kodak Company and General Electric Company, after intensive efforts over a period of years, had failed to solve the problem. Defendant Bausch & Lomb had

* The opinion of the Court of Appeals is printed in an appendix bound in the Petition.

also worked intensively on the problem over a period of years and had failed to solve it. Defendant's efforts were so unsuccessful that it had recommended to the Navy Department that the whole evaporation process be abandoned (Find. of Fact 6, Vol. II, DA 931a).

The most skilled scientists in the industry, including Dr. Hewlett of General Electric, Dr. Turner of Bausch & Lomb, Dr. Cartwright of the Research Corp. and M.I.T., and Drs. McLeod and McRae of Eastman Kodak Co. had the solution of the problem under their very eyes but failed to perceive it (trial Court Decision Vol. II, DA 915a, 920a, 921a, 922a, Find. of Fact 31, 34, 35, 39, Vol. II, DA 940a, 943a). The prior patents and publications of the art had failed to teach these skilled scientists the plaintiff's invention (Find. of Fact 37, 38, 39, Vol. II, DA 943a).

The country was at the verge of the late World War when the industry was frustrated by these failures. The Navy needed a solution to the problem but the great corporations and laboratories had failed to supply it. In 1941, the plaintiff, then a minor government employee at the Naval Gun Factory, discovered the method of the patent in suit, which proved to be the solution to the problem (Find. of Fact 7-9, Vol. II, DA 931a-933a). The importance of plaintiff's discovery is indicated by such as this finding of fact of the trial Court:

> "10. Following this successful work the plaintiff's method was applied by the Navy to virtually all important optical equipment, including binoculars, gun director telescopes, spyglasses and range finders. The success of the process was so outstanding that priorities were established for coating the optical instruments of all war vessels,

particularly combatant ships, in accordance with the plaintiff's method, as soon as the availability of the ships would permit, and the method was applied to the optics of both new construction ships, and ships in service. Numerous repair ships and tenders of the Navy were especially provided with equipment to apply the process at points adjacent to combat areas. *The plaintiff's invention greatly benefited the United States Navy and was regarded by the Navy as the most important development in submarine periscopes in recent years.** Plaintiff received special citations from the Chiefs of the Bureau of Ships and Ordnance of the Navy Department, and later by the Secretary of the Navy. The plaintiff's invention *was also adopted by the Army* for its optical equipment *and later by the industry in general.*" (Vol. II, DA 933a).

The plaintiff's method supplanted all other methods previously used. Other methods such as Cartwright's post-baking were supplanted by plaintiff's invention. The program which the Research Corp. had set up licensing Cartwright's patents including his method of post-baking was in the words of the trial Court "paralyzed by the widespread adoption of plaintiff's invention." (Vol. II, Find, of Fact 18, DA 936a).

After their own failures, certain of the optical corporations of the industry refused to recognize the plaintiff's patent though they were fully aware that it was plaintiff who had solved the problem. These corporations even publicly claimed credit for having originated the process while knowing it was the work of the plaintiff (Find. of Fact 15, 21, 22, Vol. II, DA 935a, 937a).

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* Emphasis in quotations throughout is ours.

It was found as a fact by the trial Court that when defendant commenced its commercial work "it was aware that it was producing the method covered by the plaintiff's patent" (Find. of Fact 16, Vol. II, DA 936a). Plaintiff had offered defendant Bausch & Lomb a license on royalty which the trial Court found to be reasonable (Find. of Fact 16, 17, Vol. II, DA 935a, 936a). The royalty requested by plaintiff would have amounted to about six cents on binoculars which sold for two hundred and ten dollars ($210.00), (PA* 155a).

SUMMARY OF ARGUMENT

Petitioner's "Statement of the Case" is inaccurate and misleading. Contrary to its representations, the Courts below found that plaintiff's discovery was a novel solution of a long existing and serious problem in the industry, that it was not obvious, and that defendant's infringement was deliberate. The facts as found below establish invention under the severest tests.

Petitioner's "Questions" 1 and 2 are objectionably broad and indefinite, and are not supported by any *real* conflict either with respect to the patent in suit or important principles of federal law. Plaintiff's discovery has been held to be a patentable invention by all Courts. Specifically, plaintiff's patent was not held invalid for lack of invention prior to the 1952 Patent Act, and it does not present a case for comparing the trend of decisional law in one period of years with that in another.

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* References to the record herein use "PA" with reference to the single Volume of plaintiff-appellee's appendix in the Court of Appeals.

Petitioner's "Questions" 3 and 4 misrepresent and merely dispute the findings of fact of the Courts below. The Supreme Court does not undertake to review concurrent findings of Courts below, particularly where the evidence was largely testimony of scientific experts and where the findings were complete and carefully prepared.

The applicable 1952 Patent Act states the test of invention as whether or not the discovery or improvement was obvious to a person skilled in the art. This test is not new with the 1952 Patent Act, but was used in many leading cases prior to that Act by the Supreme Court and the various Courts of Appeals. The Congress stated this test with the view that the statute might have a stabilizing effect. Both the trial Court and the Court of Appeals recognized the unprecedented completeness of the evidence establishing that plaintiff's discovery had not been obvious to the *most skilled* in the art, and they so found in declaring the patent to be valid. The findings of the Courts below establish that the discovery of the patent in suit meets the test of invention under the most rigid standard. Plaintiff's patent therefore does not present a case for comparing the trend of decisional law in one era with that in another, in order to now determine if the 1952 Patent Act has wrought a change.

ARGUMENT

PETITIONER'S "STATEMENT OF THE CASE" IS INACCURATE AND MISLEADING

Contrary to the true findings, petitioner stubbornly states the case as though the Courts below found that no problem had existed in the art, as though it had been found there was no novelty in plaintiff's discovery

and that it was anticipated by prior patents and publications, as though plaintiff's solution of the problem had been found to be "obvious" to those skilled in the art, and further as though defendant's infringement had been innocent rather than deliberate. These representations are merely a reiteration of the same arguments which were unsuccessfully advanced by petitioner in the Courts below.

It is not possible within desirable brevity of a response, to point out all instances in petitioner's "Statement of the Case" where the true facts and findings are misstated or distorted by argument, but the following instances demonstrate that petitioner's "Statement of the Case" is entirely unreliable.

In the first paragraph of the statement (Petition, page 8), after describing the evaporation process as used before the plaintiff's invention, petitioner states it was then known (implying it was so found below) that "a more tenacious and hard film" was produced by a method step known as "preheating." In the same sentence, it is stated with the same implication, that a step known as "post-baking" had "improved the tenacity and ruggedness of the coating."

The adroit wording of the same sentence also leaves the impression that this "preheating" as known in the art, was carried out *in the vacuum chamber,* rather than *in the outside air.*

The stage of the process where the heat is applied to the optical elements is of great significance because plaintiff's patented invention, which first obtained these consistently hard and durable coatings, involves heating the lenses *in the vacuum* and maintaining them in heated condition *in the vacuum* while the film is

being applied. Petitioner's description of the known "preheating" step, as involving "heating the lens, before being coated *in the vacuum*" appears to intentionally suggest that the plaintiff's method had been known and practiced in the industry prior to his invention, contrary to the positive and opposite findings of the trial Court which were affirmed by the Court of Appeals.

The trial Court, after weighing all of the evidence, discussed these known "preheating" and "post-baking" steps and found (Vol. II, DA 910a) that prior to the invention "optical elements had been coated with such materials but the coatings *had not* been *consistently rugged and durable*" and that "The *lack* of *consistent ruggedness* of the coatings had imposed inherent limitations on their use in the industry." The trial Court after specifically discussing the known "preheating" and "post-baking" steps (Vol. II, DA 911a) found that "All of such prior methods left much to be desired *with respect to the quality of ruggedness and durability* of the coated surfaces."

With respect to the implication of the petition that the "preheating" step was performed *in the vacuum*, the trial Court specifically and accurately defined the "preheating" as known in the art, as a step which was performed on the optical elements "*before* they were placed in the vacuum chamber" (Vol. II, DA 911a, lines 10 and 11), (Find. of Fact 4, Vol. II, DA 930a, line 21).

With respect to the results of the "preheating" and "post-baking" steps, it is noteworthy that in the paragraph of the "Statement of the Case" referred to, petitioner does not refer to findings below but merely

to the specification of plaintiff's patent. Even in so doing, the reference is either erroneous or intentionally misleading. The page of the specification of the patent referred to (Vol. II, DA 552a) after describing the preheating and post-baking steps, states that films so produced "*are not* sufficiently hard, durable and tenacious to resist scratching and abrasion, *nor are they sufficiently hard, durable and tenacious* to resist the corrosive action of atmospheric conditions."

The second paragraph of petitioner's "Statement of the Case" (Petition p. 8) again and more positively misstates the true facts in the words "It was known practice also in coating with such light-transmitting (reflection-reducing films) . . . to heat the lens *while being coated in the vacuum,* for the same purpose of cleaning it, . . ."

The trial Court found on all the evidence that "prior methods had also been used to pre-heat the optical elements *before* they were placed in the vacuum chamber" (Vol. II, DA 911a). The trial Court also found that "heating *in the vacuum* chamber, *while* a coating is being evaporated onto the optical surface, had *not* been disclosed in the art of applying inorganic salts to an optical surface" (Vol. II, DA 913a). The trial Court found that the patent in suit "defines a *new* and useful method or process residing in the heating of the optical elements *in the vacuum* to an elevated temperature and depositing the inorganic salt coatings of the metallic fluorides, such as magnesium fluorides, thereon *while they are maintained at this elevated temperature in vacuum*" (Find. of Fact 43, Vol. II, DA 944a).

The trial Court found that "The persons most skilled in the art had not discovered the invention of the patent in suit and had not appreciated that unusual results could be obtained thereby in securing harder films by practicing the method as defined in the patent in suit." (Find. of Fact 7, Vol. II, DA 932a).

The Court of Appeals specifically found that this step of heating the lens while being coated in the vacuum with the light transmitting films, was novel. The Court of Appeals stated "although Lyon's advance lay only in keeping the 'optical surface' itself heated *while it was being coated, this did not appear in any patent or printed publication* on November 17, 1942" (Appendix to Petition, pages 3a, 5a).

The third paragraph of petitioner's "Statement of the Case" (Petition p. 8) states the history of plaintiff's discovery and invention as though the plaintiff had learned of the invention when he visited various optical plants in 1941.

The trial Court specifically found that "plaintiff made his discovery *independently,* and did *not* acquire knowledge of the invention from the prior art *or from any of the facilities* which he had visited" (Find. of Fact 8, Vol. II, DA 932a).

This "Statement of the Case" (Petition p. 10) refers to arguments of "government solicitors" and an "interview" with the Examiner, and states that the Examiner "withdrew the rejection of the claims but without any relevant or adequate explanation." The trial Court after weighing all of the evidence, found that the Examiner did not act improperly, and that he

did give an adequate reason for allowing the claims, in the following language:

> "He found that in the art of coating with inorganic salts it had not been suggested to heat the elements to an elevated temperature in vacuum and to evaporate the films thereon while the elevated temperature was maintained in the vacuum. He found that this method was not taught by the prior patents and publications, was not obvious, and the record at the trial fully supports the findings and decision of the Examiner. (Find. of Fact 40, Vol. II, DA 943a, 944a)
>
> "The plaintiff did not misrepresent the state of the art to the Patent Office—. The whole record shows that the representations made by the plaintiff were true. The Patent Office Examiner was not improperly induced to allow the claims of the patent in suit." (Find. of Fact 42, Vol. II, DA 944a)

This misstatement in the petition is the final echo of inflammatory and false charges of fraud and collusion which defendant made below against plaintiff and unidentified officials of the Navy Department, alleging that plaintiff obtained his patent by some improper conduct on the part of these officials (Pars. XV and XVI of the Answer, Vol. I, DA 14a, 15a). *These charges were abandoned when defendant's officer Carl Bausch, at the trial, was forced to admit that* they were completely without foundation (PA 82a, 83a).

Petitioner's "Statement of the Case" makes the utterly erroneous statement that defendant's commercial operations which were held to infringe the patent were carried out "without knowledge of any claim to patent rights" by plaintiff (Petition p. 10).

The trial Court found exactly the opposite, as follows: "At the time defendant commenced this commercial work, it was aware that it was producing the method covered by plaintiff's patent" (Find. of Fact 16, Vol. II, DA 936a).

In petitioner's "Statement of the Case," it is further stated that the trial Court in upholding the patent had found "it required invention to see that the glass could be heated and cleaned in the same way and for the same purpose when depositing metal salts" (Petition p. 11, first paragraph). This misstatement has for its purpose to argue that all the plaintiff's method was intended to do was to "clean the glass," whereas the true facts, and as found by both courts below, are that the plaintiff's method was not merely for cleaning, but that it produced hard and durable light-transmitting coatings on the glass. The page of the record (Vol. II, DA 914a) referred to in this paragraph of the "Statement of the Case," has no reference at all to cleaning of the glass and the trial Court made no such finding as is represented. Throughout the trial Court's decision, the plaintiff's invention is referred to as a method which *hardens* the coatings (Find. of Fact 8, Vol. II, DA 932a).

Petitioner's "Statement of the Case" further makes the erroneous statement that a 1931 publication of Dr. Cartwright described the identical process of plaintiff's patent, in the following language (Petition p. 11, par. 2):

> "The District Court found this publication described the identical process . . ."

The exact words of the trial Court are just the opposite from what is asserted, being as follows:

> "This article *does not* disclose any heating in the vacuum as a part of a method to secure films of inorganic salts . . . if this article can be said to suggest the advantages of heating in the vacuum in applying coating of inorganic salts to optical elements, it seems strange that Cartwright himself did not use it." (Vol. II, DA 915a)

In the same paragraph of the "Statement of the Case," (page 11) petitioner states that the Court of Appeals "avoided any reference to this publication." The Court of Appeals specifically stated at the beginning of its opinion (Appendix to Petition, page 2a) that familiarity with the trial Court's opinion, which it adopted, is assumed. The Court of Appeals *did refer to the publications* as follows:

> "Thus, although Lyon's advance lay only in keeping the 'optical surface' itself heated while it was being coated, this had not appeared in any patent *or printed publication* on November 17, 1942" (Appendix to Petition, page 5a).

The paragraph of petitioner's "Statement of the Case" beginning at the bottom of page 11 particularly demonstrates the adroitly misleading nature of the statement. The paragraph starts off with the words "Both Courts found" and then continues with *a single sentence extending for seventeen lines* which weaves in a great variety of argumentative matters which the Court did not find. For example, the Court did *not* find that Cartwright carried on a commercial business in which he employed the "identical process claimed in plaintiff's patent." The trial Court found "the testimony of Cartwright and his wife regarding the use of heating in the vacuum for hardening in his commercial work at Corning prior to Lyon's claimed

invention is vague, uncertain and unsupported by any documentary evidence . . . and unpersuasive" (Vol. II, DA 918a). The trial Court further found:

> "Whatever experimental work and commercial work Cartwright may have performed at M.I.T. involving heating in the vacuum in filming with inorganic salts and later at Corning, New York, was sporadic and inconclusive and not of such nature as to invalidate the patent in suit. The evidence with respect to his work both at M.I.T. and Corning, both experimental and in his limited commercial work is uncertain and inconsistent. He did not realize any exceptional advantages which would accrue from using heat in the vacuum because he never did isolate the step of heating in the vacuum from other steps which he employed. He did some coating with these films of inorganic salts on a limited basis in his home but the evidence shows that he used his post-baking process mainly." (Find. of Fact 31, Vol. II, DA 940a).

The trial Court *did not find* that Cartwright followed a practice of "unrestricted disclosure to others" as represented in this paragraph of the "Statement of the Case," but found as follows:

> "Whenever Cartwright had opportunity to demonstrate his method, he used post-baking. *He enjoined his associates* at M.I.T. *to secrecy* with respect to any benefits which might result from the method of heating in the vacuum and Clark maintained any knowledge he had on this subject in secrecy, and withheld it . . . from the United States Navy when he was sent to Pearl Harbor in 1942 to assist in coating the optics of submarines which were coming in from combat. As a result, the optics of these periscopes were soft and unsuitable." (Find. of Fact 32, Vol. II, DA 941a)

> "The suppression of whatever Cartwright had discovered regarding the use of heating in the vacuum *was due to his own efforts to withhold it from public knowledge* and to his own failure to disclose it in his work at Naval Research Laboratory when he was under contract for compensation to give the United States Navy the benefit of whatever knowledge he had . . ." (Vol. II, DA 919a)

On the last page of petitioner's "Statement of the Case" (Petition p. 13), it is stated that the Court of Appeals "brushed aside or ignored the proofs of lack of novelty and invention . . ."

The Court of Appeals specifically pointed to the novelty of the invention, and in respect to the accepted test of obviousness stated:

> "We do not see how any combination of evidence could more completely demonstrate that, simple as it was, the change had not been obvious to a person having ordinary skill in the art." (Appendix to Petition, pages 10a, 11a)

Contrary to the representations of the petition, the true facts material to this Court's consideration of the case, as found by the trial Court, are summarized:

1. There *was* a serious problem existing in this industry over a long period of years, same being the soft and fragile nature of the light transmitting films.

2. The greatest companies and laboratories working intensively on the problem, such as defendant Bausch & Lomb, Eastman Kodak Co., General Electric Co., and others, had failed to solve the problem.

3. The most skilled scientists working in the industry over a period of years, such as Dr. Turner

of defendant Bausch & Lomb, Dr. Hewlett of General Electric Co., Dr. Cartwright of M.I.T. and Corning, and Drs. McLeod and McRae of Eastman Kodak Co. had worked intensively on the problem but *had failed* to find the solution.

4. The plaintiff in 1941, while a minor government employee, succeeded by his discovery after these great corporations and laboratories had failed.

5. The plaintiff's solution *was novel* and *was not anticipated* by prior patents, publications, nor by the experiments of the leading scientists working in the art.

6. The plaintiff's discovery was not obvious but was outstandingly inventive in character.

7. The plaintiff's invention was applied with great success by the Navy and Army during the war, contributed substantially to the winning of the war, and supplanted all other methods and has been adopted by the entire industry.

8. The greatest optical companies, including defendant Bausch & Lomb and Eastman Kodak Co. by their actions recognized the importance of the invention and even unjustly claimed credit for having originated it.

9. Both of these companies derived the invention directly from the plaintiff and not from the prior art nor from their own intensive efforts to solve the same problem.

10. The defendant Bausch & Lomb deliberately appropriated the plaintiff's invention while knowing that it was a development made by the plaintiff and the subject of patent rights which it deliberately violated.

The Court of Appeals unanimously adopted these findings and in deciding the only real issue before it, stated:

> "The most competent workers in the field had for at least ten years been seeking a hardy, tenacious coating to prevent reflection; there had been a number of attempts, none satisfactory; meanwhile nothing in the implementary arts had been lacking to put the advance into operation; when it appeared, it supplanted the existing practice and occupied substantially the whole field. We do not see how any combination of evidence could more completely demonstrate that simple as it was, the change had not been 'obvious . . . to a person having ordinary skill in the art.'" (Appendix to Petition, page 10a)

It is evident from the trial Court's opinion and Findings that the plaintiff's patent satisfied the strictest test of invention. The only question before the Court of Appeals was the validity of the patent, and whether or not the trial Court's findings were supported by substantial evidence. The Court of Appeals unanimously adopted the findings of the trial Court, while specifically recognizing the unprecedented completeness of the evidence demonstrating that plaintiff's discovery was not obvious.

Petitioner's principal ground for certiorari is that there is conflict with decisions of this Court and other Courts of Appeals because they require "a more strict determination of what would have been obvious to one of ordinary skill in the art" (Petition, page 14, last par.). It is submitted that no such conflict exists when the true facts and findings on invention in this case are considered. The facts as found satisfy invention under the severest test, whether it be that of the

applicable 1952 Patent Act, or the case law of the last 20 or 25 years, or the case law of the past 100 years.

PETITIONER'S "QUESTIONS" ARE NOT PROPERLY PRESENTED BY PLAINTIFF'S PATENT AND THE TRUE FINDINGS BELOW

Petitioner's "Questions" 1 and 2 are not supported by any *real* conflict either with respect to the particular patent in suit or important principles of federal law. Aside from their objectionably broad and indefinite nature, such questions can only be properly presented to this Court in a situation where a patent has been held *invalid* for lack of invention *prior* to the 1952 Patent Act and *valid after* the date of that Act.

The claims of the Lyon patent whose validity the petitioner seeks redetermination of, have never been held invalid by any Court. They were considered by both the trial Court and the Court of Appeals after the date of the 1952 Patent Act. They were held valid by all the judges of both Courts on findings which establish invention under the strictest test.

The Supreme Court has stated that judicial tribunals should not give opinions on abstract or hypothetical propositions. *Heitmuller* v. *Stokes,* 256 U.S. 359, 362, 41 Sup. Ct. 522, *Pelham* v. *Rose,* 76 U.S. (9 Wall) 103.

These questions rely on general obiter dicta observations of the Court of Appeals, on the trend of patent case law over an indefinite period of years preceding the 1952 Patent Act, which were not a part of and not necessary to the holding of validity which was made. The only question which was before the Court of Appeals was the validity of the claims of the patent under the now applicable law. Their unanimous decision was that the claims were valid and met the test of invention. The general observations of the opinion on what the fate of this patent *might* have

been *if* it had reached the Courts in some earlier period of years are speculative, were not necessary for the determination of the case, and did not establish that type of "real" conflict for a review on certiorari. This Court has not deemed a "conflict" in the general statements in opinions of different Courts to be such a "conflict of decision" as to warrant the grant of certiorari, and many petitions for certiorari that have relied upon verbal differences in the standards of patentability in the *opinions* of the Courts of Appeals have been denied. There must be a "real and embarrassing conflict" as to the validity of particular claims. *Layne & Bowler Corp.* v. *Western Well Works,* 261 U.S. 387, 388, 67 L. Ed. 712; *Keller* v. *Adams-Campbell Corp.,* 264 U.S. 314, 319, 68 L. Ed. 705.

Petitioner's Questions 3 and 4 merely dispute the findings of fact of the courts below. The petitioner does not even attempt to point out why it feels the true findings below are not supported by the evidence, but seizes upon a few words out of context in the opinion below, and uses them to argue that the findings were to an effect opposite to what they really were. The Supreme Court is not a court for correction of errors in fact finding, and does not undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 93 L. Ed. 672, 678; *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac,* 321 U.S. 275, 88 L. Ed. 721; *District of Columbia* v. *Pace,* 320 U.S. 698, 88 L. Ed. 408; *Williams Mfg. Co.* v. *United Shoe Corp.,* 316 U.S. 364, 86 L. Ed. 1537; *Baker* v. *Schofield,* 243 U.S. 114, 118, 61 L. Ed. 626, 630; *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175,

178; 82 L. Ed. 1273. Rule 52 (a) of the Federal Rules of Civil Procedure is particularly applicable to this case where the evidence is largely the testimony of experts and where the trial Court wrote a careful opinion and made findings covering all the factual issues, *Graver* v. *Linde, supra.*

Question No. 1

In addition to being objectionably broad and indefinite, this question is based on an assumption supported only by the erroneous representations of petitioner's "Statement of the Case," that plaintiff's discovery was found to be lacking in novelty and obvious.

In a petition for rehearing to the Court of Appeals, defendant stated the same question in the words—"Did the New Code Sections 101-103*—reduce the standard of patentable novelty and invention to such lowly and vanishing level *as to confer patentability upon the specifically old, analogous and obvious step* of heating the optical surface to clean it while being coated in the vacuum with any "suitable coating material—."

There were no findings by any Court or judge that plaintiff's discovery was not novel or that it was obvious. No judge or Court has held plaintiff's patented method to be invalid for lack of invention. All judges who have passed on this discovery have held the method to be a patentable invention.

The Court of Appeals properly weighed plaintiff's discovery by the test of invention of the 1952 Patent Act (Sec. 103). The parties are in agreement that the 1952 Patent Act is applicable. The Court of Appeals found plaintiff's discovery met the test of that Act

* 35 U.S.C. Sec. 101-103.

to a striking degree, and that it did not "see how any combination of evidence could more completely demonstrate that—the change had not been 'obvious' ", and stated its agreement with the trial Court's "searching and comprehensive analysis" which found facts establishing invention under the strictest test.

The general observations of Judge Hand about the trend of unidentified cases on the law of patentable invention over a period of one hundred years, were not necessary to the Court's unanimous decision affirming the findings of the trial Court. The only question before the Court of Appeals was the validity of the claims under the 1952 Patent Act, and whether the findings establishing invention were based on substantial evidence. The general observations and speculations in the opinion about the trend of unidentified cases on other patents in twenty-five years preceding the Act, as compared with the trend in a seventy-five year earlier period, are mere obiter dicta.

The plaintiff's patent does not present a case for comparing the trend of case law in one period of years with that in another, in order to now determine and at this early date if the 1952 Patent Act has wrought a change.

Question No. 2

This question in effect asserts that past decisions of the Supreme Court on invention gave the defendant Bausch & Lomb as a matter of "right", the license to infringe plaintiff's lawfully issued patent and to appropriate his property without compensation.

As the evidence and findings below show, defendant Bausch & Lomb is a leading company in the optical industry. In contrast, plaintiff Lyon is an individual

inventor who made his discovery as a government employee at the Naval Gun Factory.

Defendant Bausch & Lomb gained knowledge of plaintiff's invention under confidential circumstances and for the limited purpose to use same in work for the government (Find. of Fact 45, Vol. II, DA 945a). Defendant Bausch & Lomb not only knowingly appropriated the commercial fruits of plaintiff's invention, but publicly claimed credit for its development while knowing it belonged to plaintiff (Find. of Fact 15, Vol. II, DA 935a). Defendant assumed the "right" to appropriate the invention *without compensation,* and refused to take a license and to pay even a nominal royalty for its use of the invention, and by this position which it took, caused other optical companies to refuse to take such a license (Find. of Fact 16, 17, 19, Vol. II, DA 936a, 937a).

The petition presents this and the other "Questions" as matters of public interest. If the public needs protection against lone inventors, it would be better that its interests should be presented by other than a great corporation found guilty of the kind of arrogant greed which is established by the undisputed findings referred to above.

It is presumptuous for defendant to argue that the past decisions of this Court on invention should be construed to encourage such disregard of the property of others, and to assert that this Court's decisions established a "right" in defendant to commit and compound the tort of infringement.

There was no "period of invalidity" of the Lyon patent prior to the 1952 Act as assumed by Question No. 2 of the petition. The patent was prima facie valid by reason of its grant; the burden of establishing

invalidity is one which the infringer must assume (35 U.S.C. Sec. 282). Whoever uses a patented invention during the term thereof and without authority infringes the patent (35 U.S.C. Sec. 271).

There is no *"right"* to infringe recognized in any statute nor in any decision of this Court or of the Courts of Appeals.

This defendant boldly asserts by its petition that the decisions of this Court condone and authorize willful appropriation without compensation of property rights recognized by the Constitution and laws of the United States. The defendant would misconstrue and misuse the decisions of this Court to escape accountability for its calculated appropriation of plaintiff's property without compensation.

Question No. 2 is not a proper question for determination by this Court, because of its objectionable generality and indefiniteness as argued above with respect to Question No. 1, because of its contingent nature (as based on Question No. 1) *White* v. *Johnson,* 282 U. S. 367; 75 L. Ed. 388, and because of its erroneous assumption that there are findings establishing that plaintiff's patent was invalid at some period prior to the 1952 Patent Act.

Question No. 3

This question is confected by stating as facts things which were not found by the Courts below, as previously discussed. It erroneously alleges that the method of plaintiff's patent was merely for "cleaning the glass" to produce "a known coated product", i.e., that it was the same as methods used for this purpose in forming prior art reflecting coatings of metals. The question erroneously states the facts as though the

method was found to be old, but that it had been held to be patentable only as a new use under Section 100 (b) of the 1952 Patent Act (35 U.S.C., Sec. 100(b)).

The Courts below did *not* find that plaintiff's method is for "cleaning" the glass, but found that it accomplished a *hardening* of the light-transmitting coatings as had never been known before in the art, and that the claims define a *new method.*

The trial Court found that "plaintiff's method of hardening the coated optical surface provided an improved, durable and tenacious coating such as had never been obtained by prior patentees." (Vol. II, DA 913a). The trial Court referred to plaintiff's process as "a distinct advance in the art" and stated: "Plaintiff's disclosure was addressed to the problem of soft coatings, coatings too fragile to permit their use in general application and in the optical industry because of the risk of damage to the coatings from ordinary usage and handling and atmospheric conditions. Plaintiff's method of *hardening* was a successful solution of the problem." (Vol. II, DA 914a)

The trial Court found that the problem of the prior art was "lack of hardness" of the coatings, that persons most skilled in the art had not discovered that unusual results could be obtained in securing the *harder* films by practicing the method of the patent in suit (Find. of Fact 7, Vol. II, DA 932a), and that plaintiff's discovery was the providing of "coatings of much greater hardness and durability" than had been obtained in prior practices (Find. of Fact 8, Vol. II, DA 932a).

The trial Court found that plaintiff's discovery was a method which was "the first to produce transmission

type inorganic salt coatings of such consistent hardness and durability as to permit mass production—although the need for such hard and durable coatings had been apparent for many years" (Find. of Fact. 11, Vol. II, DA 934a), and that the patent in suit "defines *a new and useful method or process*" (Find. of Fact 43, Vol. II, DA 944a).

The Court of Appeals found the plaintiff's method to be novel and not found in the prior art (Appendix to Petition, pages 3a-5a). With respect to the novelty of the result and product, the Court of Appeals noted the prior art coatings were not hard, but that they "could be readily scratched or even rubbed off" (Appendix to Petition, page 6a).

Question No. 3 states that the Courts below held plaintiff's method was the same as the old processes "with known and *analogous* materials." The trial Court specifically held exactly the opposite, stating, "There is no general equivalence between salts and metals" (Find. of Fact 38, Vol. II, DA 943a). This finding was based on the examination of defendant's expert Dr. Cartwright, who testified that the salts and metals "are sufficiently tricky" so that it is not absolutely predictable how one will act as compared with another, that even all metals did not act alike as far as reaction to distillation is concerned, and that in the use of heat, one could not predict from one metal to another, and that there would be a similar uncertainty between metals and inorganic salts (Vol. I, DA 177a, 178a). The plaintiff also testified that metals and inorganic salts are not analogous (Vol. I, DA 68a).

Thus, the allegations in Question No. 3 of petitioner's "Statement of the Case", are based upon

assumptions and inaccurate statements which are diametrically opposed to what was found by the Courts below. The allegations in Question No. 3 that there was no problem, that plaintiff's method was not novel, and did not solve a problem and did not produce a new result, are entirely inaccurate and misleading.

Because Question No. 3 is not based on the real facts, but on an assumed and erroneous statement of the facts, it does not properly present a question for decision by this Court. The Supreme Court does not undertake to redetermine technical questions which have been already decided by concurrent findings of the Courts below.

Question No. 4

This question, like Question No. 3, merely presents petitioner's argument and disagreement with the facts as actually found by the Courts below.

The question erroneously assumes findings that Dr. Cartwright had carried out a "successful and commercial practice" of the plaintiff's method prior to the latter's discovery, and asserts that the Courts below disregarded his work merely because he had not brought the invention "to light in the art" nor "urged its adoption," by widespread publication, or because his use was only in "small volume."

These assumptions and arguments are not supported by the findings of the trial Court, nor by the opinion of the Court of Appeals. The true findings were based on all the evidence including the open court testimony of Dr. Cartwright who was examined for two full days at the trial, the testimony of his wife, the records of

his commercial activities which disclosed only the use of his post-baking method, the testimony of his associate Clark and others, and his published articles and patents.

These findings establish that Dr. Cartwright *did not* possess the knowledge that plaintiff's method would produce the sought for harder coatings of the light transmitting type. They establish that *he did not* complete the invention prior to plaintiff's discovery. The trial Court found:

> "The testimony of Cartwright and his wife regarding the use of heating in the vacuum for hardening in his commercial work at Corning *prior to Lyon's claimed invention* is vague, uncertain, unsupported by any documentary evidence (although there is documentary evidence of post-baking), and unpersuasive. This proof of anticipation does not measure up to the quality of proof required to defeat a patent.—On all the evidence regarding Cartwright's experiments, and his work with heating in the vacuum for hardening evaporated coatings, I conclude that Cartwright did not appreciate the benefits of heating in the vacuum, and that any such use by him was sporadic and inconclusive as to any definite advantages obtainable." (Vol. II, DA 918, 919a)

It is noteworthy that the trial Court in particular was not persuaded by the evidence of Dr. Cartwright's activities *prior* to plaintiff Lyon's invention.

The trial Court also found that while Cartwright had experimented with the step of heating in the vacuum *in conjunction with other steps,* he had never isolated it from the other steps such as his post-baking

method which he had concluded was the solution to the problem. The trial Court found:

"The evidence with respect to his work both at M.I.T. and Corning, both experimental and in his limited commercial work is uncertain and inconsistent. He did not realize any exceptional advantages which would accrue from using heat in the vacuum because he never *did isolate the step*— from other steps which he employed—." (Find. of Fact 31, Vol. II, DA 940a)

" — Dr. Coolidge (one of Hewlett's associates at General Electric) had written to Cartwright's representatives to find out the details of Cartwright's procedure —. The reply — was a short communication stating the essential points to be (1) pre-heating; (2) post-baking; (3) cooling the glass and the immediate application of a waterproofing agent. *No reference was made to the use of heat in the vacuum.* This was immediately prior to Cartwright's employment at the Naval Research Laboratory. Cartwright had previously used heating in the vacuum *along with his post-baking* and had so informed Hewlett in November, 1939. Cartwright's reply referred to in Hewlett's diary lends support to the conclusion that Cartwright did not properly evaluate the advantages of heating in the vacuum and that by July of 1940, *he also had abandoned its use.*" (Vol. II, DA 921a)

"I am not persuaded by the evidence that Cartwright concealed or withheld the idea and use of heating in the vacuum for hardening *with knowledge* that that was the best method for obtaining hard and rugged coatings. I think rather that whatever experiments he had conducted along that line and whatever occasional use he had made of it in his commercial work *had convinced him that it was inferior* in results to his own patented post-baking method —. His testimony at the trial

> leaves no doubt about the fact that he is still uncertain whether one 'could not get as hard a film if you left out the actual heating in the vacuum.' *And he admitted in his testimony at the trial* that *that was the way he felt about it in 1940 and 1941.*" (Vol. II, DA 919a, 920a)

The Court of Appeals observed that Cartwright had "abandoned his discovery as soon as it emerged from the stage of experiment" and specifically stated its agreement with the findings of the trial Court in respect to Cartwright's work, making reference to Cartwright's testimony at the trial (Appendix to Petition, page 9a). The Court of Appeals stated:

> "He did indeed test it out to his satisfaction; and when he had done so, he concluded it *would not* do what he was after. It *did not* produce a more 'rugged' film and he gave it up. It was in effect an abandonment; it did more than fail to advance the art; *it put the process among those efforts that are proved useless.* All the reasons that have made the courts refuse to treat experimental users as anticipations, apply even more convincingly; it is not alone that such activities are not evidence of anticipation, they are evidence against. — We conclude therefore with Judge Burke that Cartwright neither put the process to 'public use,' nor was he its prior inventor." (Appendix to Petition, page 10a)

The last paragraph on page 22 of the petition is characteristic of the whole petition in its misstatement of the findings below. This paragraph states as a finding of the trial Court, that Cartwright reduced the invention to practice successfully, and used and disclosed it to others "without secrecy."

The trial Court actually found with respect to Cartwright's work:

> "Clark complied with Cartwright's request, and although employed at National Research Corporation until October, 1942, he never used nor disclosed any method for hardening except post-baking. His *calculated suppression* of the idea and of the use of heating in the vacuum *was directly attributable to Cartwright's request* to Clark not to divulge the idea because Cartwright did not want it to be known publicly." (Vol. II, DA 917a)
>
> " — *the suppression* of whatever Cartwright had discovered regarding the use of heating in the vacuum was due to *his own efforts to withhold it* from public knowledge —." (Vol. II, DA 919a)
>
> "*He enjoined his associates at M.I.T. to secrecy*—and Clark maintained any knowledge he had on this subject in secrecy —." (Find. of Fact 32, Vol. II, DA 41a).
>
> "Whatever knowledge he may have had from heating in the vacuum *he maintained in secrecy.*" (Find. of Fact 34, Vol. II, DA 941a)
>
> "Whatever he did discover regarding the use of heating in the vacuum *was withheld from public knowledge* through the affirmative steps taken by Cartwright. These affirmative steps were taken by Cartwright because he had failed to appreciate the advantages obtainable by heating in the vacuum." (Find. of Fact 34, Vol. II, DA 942a)

A further example of stubborn misstatement of the findings below appears in the second paragraph, page 23 of the petition. It is there stated with respect to Cartwright's work that the Court of Appeals "con-

cluded that this was a public use of the claimed invention from 1939 on."

The Court of Appeals stated its affirmance of the District Court's findings as follows:

> "We conclude therefore with Judge Burke that Cartwright neither put the process to 'public use,' nor was he its prior inventor." (Appendix to Petition, page 10a)

In Summary, Question No. 4 merely presents petitioner's disagreement with the facts as found by the Courts below, and misrepresents these findings. The Supreme Court does not grant certiorari to redetermine involved questions of fact which have been weighed and determined by concurring findings of the Courts below.

THE FINDINGS BELOW ESTABLISH THAT PLAINTIFF'S DISCOVERY SATISFIED THE MOST RIGID TEST OF INVENTION

The invention of the patent in suit was weighed by the trial Court under the law which governed at the time of its decision, the 1952 Patent Act. That Act (Sec. 103) states the test of invention to be whether "the subject-matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art . . . ." This test of invention was not new with the 1952 Patent Act, but was incorporated therein, in the language of the report of the House "with the view that an explicit statement in the statute may have some stabilizing effect,* . . . ." This test of invention was applied in many leading cases prior to the 1952 Patent Act by

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* Discussed in Channel Master Corp. v. Video Television, Inc., 117 F. S. 812, 815, D.C.N.Y. 1953.

the Supreme Court and the various Courts of Appeals, over a long period of years, and including the twenty or twenty-five year period prior to the 1952 Patent Act.

In *Goodyear Tire & Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 278, 279; 88 L. Ed. 721, 723, 724, decided in *1944,* this Court upheld the validity of a patent on findings of the trial Court which had been affirmed by the Court of Appeals. The Supreme Court made reference to the trial Court's findings "that the problem presented was old and no solution was attained prior to Anthony's invention . . . that the cell met with immediate commercial success due to the advantages of its construction . . .," and "that its advantages were recognized by the Army and other governmental agencies." The Court then said:

> "Viewed after the event, the means Anthony adopted seemed simple and such as should have been obvious to those that worked in the field, but this is not enough to negative invention. * * * the manufacturers of flashlight cells were conscious of the defects in them, no one devised a method of curing such defects. Once the method was discovered it commended itself to the public. * * * Accepting as we do, the findings below, we hold the patent valid and infringed."

Application of this accepted test of invention involves consideration of *what actually happened in the art or industry,* to ascertain if a problem existed which defied solution over a substantial period of time and if the patentee solved the problem where others had failed, in order to determine whether or not his solution was an "obvious" one.

That the test was applied in the Second Circuit before the 1952 Act is evident from the language from

Landis Machine Co. v. *Parker-Kalon Corp. et al.*, 190 F. 2d 543, 545 (C.A. 2 1951) where the Court said:

> "* * * if Lloyd's combination of these disclosures resolved a want which had been felt all along: that is, if it swept the board; there would be reason to conclude that his discovery was beyond the capacities of ordinary qualified members of the craft."

That the test was applied in the Second Circuit after the 1952 Act, is apparent from the following language from *Channel Master Corp.* v. *Video Television*, 117 F. S. 812, 815 (D.C. E.D. New York, 1953):

> "This is not a situation where the alleged improvement was seriously needed in the industry, and although desparately sought after, remained undiscovered for a long period of time."

The trial Court's findings in this suit establish that this test of invention was satisfied to a striking degree. The formidable array of witnesses brought forward by defendant Bausch & Lomb in its efforts to defeat plaintiff's patent told the whole history of this art and industry. The trial Court heard the testimony of scientists *which both parties admit were the most active and most skilled in the art.* The trial Court found there was a problem which resisted intensive efforts of the most skilled to solve it, including the efforts of the greatest laboratories in the country.

It is significant that an individual inventor solved the problem after the failures of the great corporations and laboratories, and that his discovery was found by the Courts below to satisfy the exacting test of invention.

In *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274, 275; 93 L. Ed. 672, 676, 677, decided in 1949, this Court upheld the validity of claims of a patent based on findings of the trial Court in the seventh circuit, noting the provisions of Rule 52a of the Federal Rules of Civil Procedure that such findings should not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses. The Supreme Court stated that this rule is particularly applicable where the testimony below was largely that of experts, and where the trial Court had written "a careful and succinct opinion and made findings covering all the factual issues."

In *Faulkner* v. *Gibbs,* 338 U.S. 267, 268; 94 L. Ed. 62, decided in 1949, the Supreme Court upheld the validity of a patent, based upon concurrent findings of invention by the two Courts of the ninth circuit below.

Petitioner has failed to even argue that the true findings of the trial Court, in the present case, are not supported by substantial evidence, but has based its petition on assumed and erroneous findings.

The test of "obviousness" to determine the presence of invention has been applied in the various circuits over a long period of years and including the past twenty or twenty-five years, as indicated by the following cases:

Lincoln Stores v. *Nashua Mfg. Co.*, 157 F. 2d 154, 163 (C.A. 1), July 19, 1946, (Cert. Den. 329 U.S. 811).

Grant Paper Box Co. v. *Russell Box Co.*, 154 F. 2d 729, (C.A. 1) 1946 (Cert. Den. 329 U.S. 741).

Brown & Sharp Mfg. Co. et al v. *Kar Engineering Co., Inc.,* 154 F. 2d 48, 52, (C.A. 1) 1946, (Cert. Den. 328 U.S. 869).

United Chromium, Inc. v. *International Silver Co.,* 60 F. 2d 913, 916 (C.A. 2), July 29, 1932 (Cert. Den. 288 U.S. 600).

B. G. Corporation v. *Walter Kidde & Co., Inc.,* 79 F. 2d 20, 22, (C.A. 2) July 1, 1935.

Hayes et al v. *Surface Combustion Corporation,* 96 F. 2d 61, 64, 65, (C.A. 2), April 4, 1938.

Union Carbide & Carbon Corp. v. *Stuart Laboratories,* 194 F. 2d 823, 824, 825, (C.A. 3), 1952 (Cert. Den. 343 U.S. 967).

Procter & Gamble Mfg. Co. v. *Refining Inc.,* 135 F. 2d 900, 908 (C.A. 4) 1943.

Florence-Mayo Nuway Co. v. *Hardy et al.,* 168 F. 2d 778, 780-782 (C.A. 4) 1948.

O. K. Jelks & Son et al v. *Tom Huston Peanut Co.,* 52 F. 2d 4, 7, 8 (C.A. 5), August 24, 1931, (Cert. Den. 284 U.S. 686).

Jeoffroy Mfg. Co. v. *Graham,* 206 F. 2d 772, 774, 776 (C.A. 5) 1953 (Cert. Den. 347 U.S. 920; Rehearing Den. 347 U.S. 940).

Guiberson Corp. v. *Garrett Oil Tools, Inc.,* 205 F. 2d 660, 663, 665 (C.A. 5), 1953 (Cert. Den. 346 U.S. 886; Rehearing Den. 346 U.S. 917).

Forestek Plating & Mfg. Co. v. *Knapp-Monarch Co.,* 106 F. 2d 554, 557, 558, (C.A. 6), Sept. 18, 1939.

Kelley-Koett Mfg. Co. v. *McEuen,* 130 F. 2d 488, 492 (C.A. 6) 1942, (Cert. Den. 318 U.S. 763).

Adler Sign Letter Co. v. *Wagner Sign Service,* 112 F. 2d 264, 267 (C.A. 7), 1940 (Cert. Den. 311 U.S. 692).

Delta Mfg. Co. v. *E. L. Essley Machinery Co.,* 153 F. 2d 905, 906, (C.A. 7), February 28, 1946 (Cert. Den. 328 U.S. 867).

National Slug Rejectors v. *A.B.T. Mfg. Corporation,* 164 F. 2d 333, 335 (C.A. 7), Oct. 17, 1947 (Cert Den. 333 U.S. 832; Rehearing Den. 333 U.S. 850).

Ric-Wil Co. v. *E. B. Kaiser Co.,* 179 F. 2d 401, 404 (C.A. 7), January 5, 1950, (Cert. Den. 339 U.S. 958).

Sbicca-Del Mac, Inc., et al v. *Milius Shoe Co.,* 145 F. 2d 389, 394, 395 (C.A. 8), Nov. 18, 1944.

General Motors Corporation v. *Kesling,* 164 F. 2d 824, 827, 829 (C.A. 8), Dec. 17, 1947 (Cert. Den. 333 U.S. 855; Rehearing Den. 333 U.S. 870).

Willis v. *Town et al.,* 182 F. 2d 892, 895 (C.A. 8), June 27, 1950.

Johnson Co v. *Philad Co., et al.,* 96 F. 2d 442, 444 (C.A. 9), May 4, 1938.

Patterson-Ballagh Corp v. *Moss,* 201 F. 2d 403, 406 (C.A. 9), January 27, 1953.

Skinner Brothers Belting Co. v. *Oil Well Improvements Co.,* 54 F. 2d 896, 898, (C.A. 10), 1931.

Dow Chemical Co. v. *Williams Bros. Well Treating Corporation,* 81 F. 2d 495, 496 (C.A. 10), Jan. 10, 1936, (Cert. Den. 298 U.S. 690).

Williams Iron Works Co. v. *Hughes Tool Co.,* 109 F. 2d 500, 510, (C.A. 10), Jan. 13, 1940.

Harris v. *National Machine Works,* 171 F. 2d 85, 88 (C.A. 10), Nov. 18, 1948 (Cert. Den. 336 U.S. 905; Rehearing Den. 336 U.S. 929).

Oliver United Filters v. *Silver,* 206 F. 2d 658, 664, (C.A. 10), July 23, 1953, (Cert. Den. 346 U.S. 923).

Levin v. *Coe,* 132 F. 2d 589, 596 (C.A.D.C.) Nov. 2, 1942.

CONCLUSION

It is respectfully submitted that the petition should be denied for the following reasons:

(a) The discovery of plaintiff's patent was held to be a patentable invention by strong findings of the trial Court which were affirmed by the Court of Appeals. The petition makes no effort

to show that these findings were not supported by substantial evidence.

(b) No conflict of decisions is presented, for plaintiff's patent has never been held invalid for lack of invention by any Court.

(c) No conflict on important questions of federal law is presented, for the affirmed findings established invention under the test applied by the Courts for many years, as well as satisfying the now applicable test of invention of the 1952 Patent Act.

(d) Plaintiff's discovery was an invention which greatly and directly benefitted the public by contributing substantially to the success of our Armed Forces in the last war.

(e) The "Statement of the Case" of the petition does not present the material facts as required by Rule 23-1 (e). It so inaccurately misstates the findings of the Courts below as to justify denying the petition under Rule 23-4 of this Court.

Respectfully submitted,

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